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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RAMON DIAZ, Defendant and Appellant.	G046207 (Super. Ct. No. 08CF2659) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lilia E. Garcia and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Ramon Diaz, a minor, was convicted of a special circumstance gang-related murder and found to have personally discharged a firearm causing death or injury in the commission of the murder. He contends, inter alia, there is insufficient evidence of deliberation and premeditation, the court erred in instructing the jury, and the prosecutor committed misconduct. We affirm.

I

FACTS

The information charged defendant Ramon Diaz and Oscar Hernandez[1] with murder (Pen. Code,[2] § 187, subd. (a); count one) and actively participating in a criminal street gang (§ 186.22, subd. (a); count two). The information further alleged the murder was committed for the benefit of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)), defendant personally discharged a firearm causing injury or death (§ 12022.53, subd. (d)), Hernandez vicariously discharged a firearm (§ 12022.53, subds. (d), (e)(1)), and a gang-murder special circumstance (§ 190.2, subd. (a)(22)) in connection with the murder charge. A third count, voluntary manslaughter (§ 192, subd. (a)), was subsequently added by interlineation shortly before trial.

Saul R. got out of school on the afternoon of September 10, 2008, and was walking with his sister when he saw a friend of his, Rodrigo Valle, on the corner of Flower and Walnut Streets. Saul R. and Valle started talking, a crowd started to form, and Saul R.'s sister told him to get away from Valle. Saul R. saw defendant and another male wearing a baseball hat with a "B" on it approach Valle.

Defendant asked Valle where he was from. Valle did not answer. Saul R.'s cousin was there and started crying. Valle then responded, "Let's get down,"[3] and

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[1] Oscar Hernandez is not a party to this appeal.

[2] All statutory references are to the Penal Code unless otherwise stated.

[3] Saul R. said "let's get down" means a fistfight was intended.

"Krazy Proud Criminals" (KPC). Defendant said, "No," and pulled out a gun. Saul R. said Valle attempted to run, but was unable to as defendant shot Valle in the chest. Valle went to the ground and Saul R. heard three more shots. Then defendant and the male with the baseball hat ran. Saul R. stayed with Valle until the police and ambulance arrived.

Saul R. knew KPC is a gang and that Barrio Small Town is a rival gang. He also knew that asking "where are you from," is a "hit up" by a gang member. Saul R. had been hit up by defendant the week before defendant shot Valle. Defendant identified himself as "Bandit" from Small Town. Saul R. replied he did not "bang" and defendant let him go about his business.

Valle's sister was a student at the school. She said her brother met her at school that day to walk her home. She noticed her brother and defendant staring at each other. Then defendant and another male approached them. Valle took off his outer shirt. Defendant asked Valle where he was from. Valle said he was from KPC. Defendant then shot him four or five times and ran away. She said defendant advanced on her brother just prior to shooting him, and her brother backed up against a fence. Valle was "like almost leaning on the fence" when he was shot. She saw defendant was wearing a glove on his gun hand. Valle was unarmed and no blows had been exchanged or attempted.

Defendant's girlfriend at the time of the shooting testified. As she was leaving school that day, she saw defendant on the corner of Flower and Walnut Streets. She denied any memory of the shooting, but in the recorded statement she made to the police, she said she saw defendant cross the street and approach two males on the other side, asked one of the males where he was from, heard defendant laugh at the response, pull a gun out of his waistband and start shooting. She said she and defendant's cousin attempted to keep him from assaulting Valle, but he would not listen.

She also told police defendant had belonged to another gang and had the moniker "Panic." He then got jumped into Barrio Small Town and has the moniker "Bandit."

Defendant's cousin saw defendant approach Valle. She saw something in his hand, but thought it was a knife or a shank. She realized it was a gun after she heard three loud gunshots.

Ana N. was a classmate of defendant's at the school. She saw defendant remove a handgun from his waistband before the shooting and run away after the shooting.

Officer Michael Kuplast of the Santa Ana Police Department was dispatched to the location of the shooting. He saw a young male Hispanic on his back, bleeding from his upper torso. Kuplast tried speaking with him but Valle was unable to respond. Paramedics arrived shortly thereafter and transported Valle.

Kuplast found six .22-caliber shell casings in the area of the shooting. Another officer searched Valle at the scene. Valle was not armed.

Sergeant Charles Flynn took part in the investigation and contacted defendant. After being advised of his *Miranda*[4] rights, defendant denied any awareness of the shooting. Defendant also denied membership in any gang. Flynn noticed defendant had an "S" tattooed on one arm and a "T" on the other. Flynn said the tattoos were a reference to the Barrio Small Town criminal street gang.

Dr. Anthony Juguilon performed the autopsy on Valle. Valle had been shot four times. One gunshot wound was to Valle's right upper back. The bullet pierced both lungs as well as the superior vena cava — the largest vein in the body — and the pulmonary vein. That bullet entered the pulmonary vein, went into the heart and then traveled through an artery, finally coming to rest in Valle's left femur area.

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[4] *Miranda v. Arizona* (1966) 384 U.S. 436.

There was a gunshot wound to Valle's lower left back. That bullet entered the abdominal cavity, lacerating the small bowel. The bullet exited through the upper abdomen. A third gunshot wound was to the inside back of Valle's right forearm. The fourth gunshot wound was superficial. The bullet entered Valle's right wrist and exited through the top of his right hand.

Dr. Juguilon examined the body for stippling — unburned gunpowder found when a firearm is fired within approximately two feet — and did not find any. The doctor said the lack of stippling means the shots were fired from a distance of at least two feet.

Detective Julian Rodriguez is familiar with the criminal street gangs Krazy Proud Criminals and Barrio Small Town. He said the two gangs are rivals. He testified to the common signs or symbols used by Barrio Small Town, including their use of the letter B from sports teams like the Bruins or the Boston Red Sox. He also testified the gang's primary activities are assault with a firearm and possession of firearms, and to the gang's pattern of criminal activity. The detective said a "hit-up" consists of asking a person where he is from. He said the purpose may be twofold: either because the person hitting up the other does not know the person and he is in their territory, or the person doing the hit up has already determined to initiate a confrontation. The detective opined defendant was an active participant in the Barrio Small Town criminal street gang and that the shooting was for the benefit of and at the direction Barrio Small Town because an act of violence in broad daylight sends a message to the community about the gang, causing fear (or what the gang calls respect).

The jury found defendant guilty of first degree murder and actively participating in a criminal street gang. The jury also found all the special allegations, including the murder special circumstance, true. Although the special circumstance made defendant eligible for a sentence of life in prison without the possibility of parole (§ 190.5, subd. (b)), the court chose to impose a sentence of 25 years to life on the murder

conviction as defendant was under 18 at the time of the offense. The court imposed a consecutive term of 25 years to life on the personal discharge of a firearm allegation for an aggregate term of 50 years to life. The court stayed the sentence on count two pursuant to section 654 and noted that pursuant to section 186.22, subdivision (b)(5), defendant cannot be considered eligible for parole until he has served at least 15 calendar years.

II

DISCUSSION

A. *Sufficiency of the Evidence*

Defendant first contends the evidence does not support the jury finding he killed as a result of deliberation and premeditation, and the evidence supports only a charge of second degree murder. Murder is the unlawful killing of another with malice aforethought. (§ 187, subd. (a).) The crime is divided into degrees. (§ 189.) Murder is of the first degree when deliberate and premeditated. If the murder is not shown to be of the first degree, it is deemed to be second degree murder. (*Ibid.*)

1. *Standard of Review*

"'In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We must accept all assessments of credibility made by the trier of fact and determine if substantial evidence exists to support each element of the offense. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 387.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) In

making this inquiry, it is important to note we do not ask ourselves whether *we* believe the evidence established guilt beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.]" (*Id*. at p. 319.) "The standard of review is the same when the prosecution relies mainly on circumstantial evidence. [Citation.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 104.)

"While reasonable minds may differ on the resolution of [a particular issue], our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citations.]" (*People v. Lashley* (1991) 1 Cal.App.4th 938, 946.) "If the circumstances reasonably justify the jury's findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding. [Citations.]" (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139, fn. omitted.)

2. *The Evidence Supports the Conviction*

"Proof of deliberation, premeditation and willfulness may be inferred from facts and circumstances which furnish a reasonable foundation for such a conclusion. [Citations.]" (*People v. Brubaker* (1959) 53 Cal.2d 37, 40.) "'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.] 'The process of premeditation . . . does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . ." [Citations.]' [Citation.]" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) "We do not undertake to say, as a matter of law, how long a thought must be pondered before it can be said to be deliberated and premeditated. That is fundamentally a question of fact for the jury in each case . . . ." (*People v. Bender* (1945) 27 Cal.2d 164, 184, disapproved on other grounds in *People v.*

Lasko (2000) 23 Cal.4th 101, 109-110.) On the other hand, "'[w]hen the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder; but in such a case the verdict should be murder of the second degree, and not murder of the first degree.' [Citation.]" (*People v. Bender, supra,* 27 Cal.2d at p. 179.)

In *People v. Anderson* (1968) 70 Cal.2d 15, our Supreme Court set forth guidelines for analyzing whether a murder was deliberate and premeditated. (*People v. Sanchez* (1995) 12 Cal.4th 1, 32, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) These guidelines were based upon three categories of evidence recurring in the cases reviewed by the court: "planning, motive, and manner of killing. [Citations.]" (*People v. Halvorsen* (2007) 42 Cal.4th 379, 420.) "The type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." (*People v. Anderson, supra,* 70 Cal.2d at pp. 26-27.) We review each of the *Anderson* categories in turn.

i. *Planning Activity*

As stated above, this factor looks to those "facts about how and what defendant did *prior* to the actual killing to show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as 'planning' activity." (*People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-27.) Pertinent to the present case, these facts include defendant's possession of a firearm and his membership in a criminal street gang. That is not to say possession of a firearm in and of itself, or membership in a criminal street gang is evidence of a preexisting intent to kill, but these are facts to consider and here, when added to the fact that defendant "hit up" the victim — meaning a violent confrontation was intended if the victim did not give the right answer — and the fact defendant wore a glove on one hand, his shooting hand, support a reasonable inference defendant killed as a result of deliberation and premeditation. Wearing the one glove shows defendant intended to use the gun. The jury could have reasonably concluded the glove was worn so gunshot residue would not end up on defendant's hand, and/or the glove was worn so defendant's fingerprints or DNA would not be left on the gun. These facts support a reasonable inference defendant deliberated and premeditated the murder.

ii. *Prior Relationship*

Although there is no evidence relating to any prior relationship between defendant and Valle from which one might reasonably infer a motive to kill Valle, there is other evidence to supply a motive. Defendant was a member of Barrio Small Town and Valle was a member of a rival gang. Defendant and Valle stared at each other from across the street, prior to defendant approaching Valle with a loaded firearm and a glove on his shooting hand. A "hit up" occurs when a member of a gang inquires of someone, "Where are you from?" According to the gang expert, the question is asked to determine if the person is in the wrong neighborhood or as a prelude to a *predetermined*

confrontation. This evidence, too, supports the jury's finding of deliberation and premeditation.

iii. *Manner of Killing*

After defendant "hit up" Valle and Valle said he was from KPC, it appears Valle expected a fistfight, so he took off his outer shirt. Defendant, however, just laughed and pulled out his firearm. There was testimony Valle attempted to run before he was shot. Defendant shot Valle four times from behind.[5] According to Saul R., three of the shots occurred after Valle was already on the ground.

Laughing at the victim's attempt to defend himself, pulling out a gun and then shooting the victim four times from behind as the victim *attempted* to run away, taken together with the above facts is sufficient evidence of planning and motive to support a reasonable inference of deliberation and premeditation. Consequently, we cannot say this evidence "'leaves only to *conjecture and surmise* the conclusion that defendant either arrived at or carried out the intention to kill as the result of a concurrence of deliberation and premeditation.' . . . [Citation.]" (*People v. Anderson, supra*, 70 Cal.2d at p. 25.) To the contrary, we conclude "'a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.]" (*People v. Hughes* (2002) 27 Cal.4th 287, 370.) The charge of first degree murder is supported by the evidence.

B. *Instructional Issues*

Defendant challenges a number of the instructions given by the court. He contends that as he was charged with a gang-murder special circumstance allegation, the trial court erred in instructing the jury pursuant to CALCRIM No. 370 that the charged offenses do not require motive on defendant's part. According to defendant, the

[5] It appears the bleeding Kuplast observed from Valle's chest was from the exit wound of the bullet that entered through Valle's lower back.

instruction improperly lessened the prosecution's burden of proof in connection with the special circumstance. He also complains about the instructions the court gave pursuant to CALCRIM Nos. 521, 522, and 570.

1. *CALCRIM No. 370*

Because defendant was charged with a gang-murder special circumstance, the court instructed the jury pursuant to CALCRIM No. 736. In pertinent part, the instruction given the jury stated: "To prove that this special circumstance is true, the People must prove that: [¶] 1. The defendant intentionally killed Rodrigo Valle [¶] 2. At the time of the killing, the defendant was an active participant in a criminal street gang; [¶] 3. The defendant knew that members of the gang engage in or have engaged in a pattern of criminal activity; [¶] AND [¶] 4. The murder was carried out to further the activities of the criminal street gang." Defendant acknowledges that CALCRIM No. 736 correctly states the law. He contends, however, the trial court erred in charging the jury in the terms of CALCRIM No. 370: "The People are not required to prove that the defendant had a motive to commit any of the crimes charged. In reaching your verdict you may, however, consider whether the defendant had a motive. Having a motive may be a factor tending to show the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty." He argues this instruction lightened the prosecution's burden to prove the gang-murder special circumstance allegation because proof of the special circumstance required the killing to have been committed with "the motive 'to further the activities of the criminal street gang.'" We review de novo whether an instruction properly states the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

CALCRIM No. 370 is an accurate statement of the law. (*People v. Howard* (2008) 42 Cal.4th 1000, 1024; *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1192-1193.) Defendant did not object to the giving of the instruction or seek to have it amended. He has therefore forfeited the issue. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.)

Even were we to reach the merits, defendant's argument fails. "[M]otive is not an element of any crime . . . ." (*People v. Daly* (1992) 8 Cal.App.4th 47, 59.) The one exception to this statement is a violation of section 647.6. That section punishes individuals who engage in prohibited conduct "*motivated* by an unnatural or abnormal sexual interest in children . . . ." (§ 647.6, subd. (a)(2), italics added.) Recognizing the general rule, the court in *People v. Maurer* (1995) 32 Cal.App.4th 1121 declared "section 647.6 is a strange beast." (*Id.* at p. 1126.) "'[I]t applies only to offenders who are *motivated by* an unnatural or abnormal sexual interest or intent.' [Citation.]" (*Id.* at p. 1127.) Because section 647.6 specifically requires proof of an unnatural or abnormal sexual interest of the defendant as the motivation for the prohibited touching, the general motive instruction was at odds with the instruction on the elements of a section 647.6 violation. (*People v. Maurer, supra,* 32 Cal.App.4th at p. 1127.)

"'Motive, intent, and malice . . . are separate and disparate mental states. The words are not synonyms. . . . Motive describes the reason a person chooses to commit a crime. The reason, however, is different from a required mental state such as intent or malice." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 504.) Defendant's argument was rejected by the court in *People v. Fuentes* (2009) 171 Cal.App.4th 1133. Fuentes had been charged with a number of crimes, including murder. The information also charged a gang-murder special circumstance allegation. (*Id.* at p. 1137.) Fuentes argued on appeal that the court erred in instructing the jury pursuant to CALCRIM No. 370 because the instruction contradicted the gang enhancement (§ 186.22, subd. (b)(1) and the gang-murder special circumstance instruction, lessening the prosecution's burden of proof in connection thereto. (*People v. Fuentes, supra,* 171 Cal.App.4th at p. 1139.)

The *Fuentes* court rejected the argument. "An intent to further criminal gang activity is no more a 'motive' in legal terms than is any other specific intent." (*People v. Fuentes, supra,* 171 Cal.App.4th at p. 1139.) The court noted a premeditated murderer's intent to kill is not considered "a 'motive,' though his action is motivated by a

desire to cause the victim's death" (*ibid*.), and acknowledged that "[a]ny reason for doing something can rightly be called a motive in common language, including—but not limited to—reasons that stand behind other reasons. For example, we could say that when A shot B, A was motivated by a wish to kill B, which in turn was motivated by a desire to receive an inheritance, which in turn was motivated by a plan to pay off a debt, which in turn was motivated by a plan to avoid the wrath of a creditor." (*Id*. at p. 1140.)

We are in agreement with the *Fuentes* court. Accordingly, we find the trial court did not err in charging the jury pursuant to CALCRIM No. 370. (See also *People v. Mejia* (2012) 211 Cal.App.4th 586, 613 [conduct of provocateur in provocative act murder sufficient to support finding the killing was "*intended* to further the activities of the gang"] italics added.) The court correctly instructed the jury the special circumstance allegation required a specific intent.

2. *CALCRIM Nos. 521, 522, and 570*

"The trial court has a sua sponte duty to instruct the jury on the general principles of law relevant to the issues raised by the evidence. [Citation.] This sua sponte duty encompasses instructions on lesser included offenses that are supported by the evidence. [Citation.] Additionally, even if the court has no sua sponte duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly. [Citation.] Once the trial court adequately instructs the jury on the law, it has no duty to give clarifying or amplifying instructions absent a request. [Citation.]" (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1331.)

The trial court instructed the jury pursuant to CALCRIM Nos. 521, 522, and 570. Defendant contends these instructions permitted the jury to convict him of first degree murder even if he acted in the heat of passion. We disagree.

CALCRIM No. 521 defines first degree murder and states the prosecution's obligation to prove beyond a reasonable doubt the killing was willful, deliberate and with premeditation. The instruction further states deliberation and premeditation is not present

when a decision to kill is "made rashly, impulsively, or without careful consideration." (CALCRIM No. 521.) The instruction is consistent with its counterpart, CALJIC 8.20, which has been found to correctly state the law. (*People v. Millwee* (1998) 18 Cal.4th 96, 135.)

CALCRIM No. 522 addresses the effect of provocation on the determination of whether a killing was a first or second degree murder. This instruction has been found to be a correct statement of the law. (*People v. Hernandez, supra,* 183 Cal.App.4th at pp. 1333-1335.)

CALCRIM No. 570 informed the jury that a murder may be reduced to a manslaughter if, "[a]s a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured [his] reasoning or judgment" and "[t]he provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment." Like CALCRIM Nos. 521 and 522, CALCRIM No. 570 is an accurate statement of the law. (§ 192, subd. (a); see *People v. Moye* (2009) 47 Cal.4th 537, 549-550.)

Taken together, these instructions clearly informed the jury it could only convict the defendant of first degree murder if it found beyond a reasonable doubt he acted "willfully, deliberately, and with premeditation." (CALCRIM No. 521.) The instructions further instructed the jury that a decision to kill, "made rashly, impulsively or without careful consideration is not deliberate and premeditated" (CALCRIM No. 521), and that provocation may affect whether the defendant acted with deliberation and premeditation. (CALCRIM No. 522.) CALCRIM No. 570 pertained only to the determination of whether the provocation was sufficient to reduce a murder to manslaughter, i.e., whether *malice* was negated by the provocation. Considering the instructions as a whole (*People v. Mills* (2012) 55 Cal.4th 663, 679) and presuming the jury understood and followed the court's instructions (*People v. Yeoman* (2003) 31 Cal.4th 93, 139), we conclude a reasonable juror would have understood that something

less than the provocation necessary to reduce a murder to manslaughter could negate deliberation and premeditation.

Moreover, "[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language. [Citation.]" (*People v. Lang* (1989) 49 Cal.3d 991, 1024.)

C. *Prosecutorial Misconduct*

"[O]n claims of prosecutorial misconduct our state law standards differ from those under the federal Constitution. With respect to the latter, conduct by the prosecutor constitutes prosecutorial misconduct only if it '"""so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process."""' [Citations.] By contrast, our state law considers it misconduct when a prosecutor uses '"""deceptive or reprehensible methods to attempt to persuade either the court or the jury."""' [Citations.] . . . 'A defendant's conviction will not be reversed for prosecutorial misconduct' that violates state law, however, 'unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.' [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1070-1071.)

While Detective David Randou testified, the prosecutor questioned him about statements defendant's former girlfriend made to him (the detective) about the shooting she observed. Randou said she identified defendant as the shooter. People's exhibit No. 22 was a diagram the detective used to "get some reference points as to where people were standing and what took place at the time of the homicide." The prosecutor then asked the detective about what defendant's former girlfriend told him about what had happened. In response to the prosecutor's question "And what else did she tell you," the detective said, "She said as she started to walk towards [defendant], [defendant] started walking toward this kid, who was standing on the, like I said, the southwest

corner. She thought they were going to fight. She had known [defendant] to engage in that kind of conduct." Defense counsel immediately objected and the court sustained the objection, stating the answer was becoming a narrative.

Defendant contends the judgment should be reversed based on the detective's statement, asserting the prosecutor committed misconduct in failing to instruct the detective *not* to mention defendant's girlfriend thought there would be a fight because she had seen defendant in a similar situation before. "When a prosecutor intentionally asks questions, the answers of which he knows are inadmissible, the prosecutor is guilty of bad faith attempts to improperly persuade the court or jury. [Citation.]" (*People v. Parsons* (1984) 156 Cal.App.3d 1165, 1170.) Alternatively defendant argues that if we find his trial counsel forfeited the issue by failing to request a jury admonition, trial counsel was ineffective.

Defendant's misconduct argument fails for two reasons. First, there is no evidence the prosecutor failed to tell the detective not to mention the statement about defendant fighting in the past. Second, the question asked by the prosecutor did not call for the answer given by the detective. The line of questioning had to do with what defendant's girlfriend told the detective "with respect to what occurred." The prosecutor did not ask the detective whether defendant's girlfriend made any statements about defendant's past actions, a fact defendant concedes. Consequently, we have no reason to suspect the prosecutor intentionally sought inadmissible evidence in examining the detective.

Misconduct by a prosecutor need not be intentional before a defendant is entitled to a reversal based on prosecutorial misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 822, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) However, the facts in this case do not support finding the

prosecutor engaged in misconduct, intentional or unintentional.[6]

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.

[6] As we have addressed the merits of defendant's prosecutorial misconduct claim, there is no need to address defendant's alternative ineffective assistance of counsel claim based on counsel's failure to request a jury admonishment.